

DEC 18 1940

CHARLES HENRY GRIFFIN
U.S. DEPT. OF JUSTICE

No. 575

In the Supreme Court of the United States

October Term, 1940

E. W. GRIFFIN, Petitioner

D. E. HARRIS, Secretary of the United States Circuit Court of Appeals for the Fifth Circuit

ON PETITION FOR A WRIT OF HABEAS CORPUS AND FOR
WRIT OF HABEAS CORPUS AND FOR WRIT OF HABEAS CORPUS

PRAYER FOR THE WRIT OF HABEAS CORPUS



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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 578

E. W. GWINNER, PETITIONER

v.

D. B. HEINER, FORMERLY COLLECTOR OF INTERNAL
REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 129-136) is reported in 25 F. Supp. 659. The opinion of the Circuit Court of Appeals (R. 145-150) is reported in 114 F. (2d) 723.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 9, 1940 (R. 150). The petition for a writ of certiorari was filed on No-

vember 18, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. A corporation in which petitioner was a stockholder participated in a consolidation in 1930. In exchange for his stock petitioner received, *inter alia*, securities in the new corporation, but those securities were held in escrow for him, not to be delivered to him until the following year, and subject to a restriction against sale meanwhile. Has petitioner realized income with respect to such securities in 1930?

2. If the profit resulting from that transaction be treated as having been realized in 1930, may the tax be defeated on the theory that the restrictive agreement against sale deprived the securities of any ascertainable fair market value?

STATUTES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 111. DETERMINATION OF AMOUNT OF
GAIN OR LOSS.

* * * *

(c) *Amount realized*.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(d) *Recognition of gain or loss*.—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * *

(b) *Exchanges solely in kind*.—

* * * *

(3) *Stock for Stock on Reorganization*.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * *

(c) *Gain from exchanges not solely in kind*.—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by

such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * *

STATEMENT

In 1930 the taxpayer owned 625 shares of common stock of the Duquesne Steel Foundry Company. During that year this company was consolidated with two other firms engaged in a similar line of business. Pursuant to the plan of consolidation, each shareholder in the Duquesne Company received, in exchange for each share of Duquesne stock, \$96.33 in cash, three-fourths of a share of preferred stock and one and one-half shares of common stock of Continental Roll & Steel Foundry Company, the newly organized corporation. The cash was paid outright in 1930 when the consolidation occurred. However, it had been agreed that the stockholders would not sell their new securities for a period of one year, and in order to effectuate that agreement the preferred and common shares of the new company (issued in the names of respective stockholders) were delivered to an escrow agent. (R. 125.) But it was agreed that the stock could be pledged by the record owners for a loan on condition that the pledgee

agreed not to sell it without first offering it at the same price to other parties to the restrictive agreement. (R. 123.)

The taxpayer, in paying his income taxes for the year 1930, included in his gross income the sum of \$50,362.50,¹ as the amount of gain derived from the exchange of his Duquesne stock. (R. 125.) He later filed claim and sued for refund on the ground that, because of the restriction against sale, the stock in the new company had no fair market value when distributed (R. 126), and in addition that the stock was not actually "received" in 1930, since it was held in escrow until 1931 (R. 5-6).

The District Court allowed recovery on the ground that the stock had no ascertainable fair market value (R. 132-134). The Circuit Court of Appeals reversed (R. 150), holding that the taxpayer had realized a gain on the consolidation equal to the amount asserted by the Commissioner (R. 148).

ARGUMENT

1. The decision of the court below on the first question presented by petitioner was correct. The new securities became the absolute property of pe-

¹ Since the taxpayer had received \$60,206.25 in cash (\$96.33 for each of his 625 shares), he was taxable under Section 112 (c) (1), *supra*, to the extent that his profit did not exceed the cash received. And that profit was computed to be \$50,362.50. The petitioner's present contention is that the new securities should not have been included in computing the profit.

petitioner in 1930 notwithstanding that they were being held on his behalf by the escrow agent. They must be treated as having been received in 1930 rather than in 1931.² It is somewhat misleading to speak of these securities as being held in "escrow", to the extent that that expression suggests that the right to the securities was in suspense during the period in question. These securities were not only issued in petitioner's name, but they were held for him absolutely by the escrow agent.

Petitioner does not assert that the decision below is in conflict with any other decision on this issue. He does make an oblique reference (Pet. 7) to *Avery v. Commissioner*, 292 U. S. 210, which is clearly distinguishable. In that case it was held where a check was deposited in the mail late in December and not received until January, the recipient was properly chargeable with the income represented thereby in the second of the two years involved. But in that case, the recipient obviously did not acquire any property rights in the check until he had received it. Here, on the other hand, the taxpayer actually became the owner of the

² If the securities are to be treated as having been received in 1931, a most curious result would follow. The tax is imposed only to the extent of the cash received. Section 112 (c), *supra*. But the cash was received in 1930; so that if petitioner is correct, a tax would have to be imposed in 1931 with respect to cash actually received in 1930. It seems difficult to believe that Congress could have intended any such result.

stock in 1930, and the escrow agent held the stock on his behalf.

2. The petition asserts various conflicts with respect to the second question presented, notably, *Helvering v. Tex-Penn Co.*, 300 U. S. 481, and *Schuh Trading Co. v. Commissioner*, 95 F. (2d) 404 (C. C. A. 7th).

In the *Tex-Penn* case this Court stated, as an alternative ground for its decision, that profit realized upon a certain exchange was not taxable because the securities received in exchange did not have a fair market value capable of being ascertained with reasonable certainty when viewed in the light of their highly speculative quality and in the light of a restrictive agreement. P. 499. It is exceedingly dubious whether the Court would have reached that conclusion upon the basis of the restrictive agreement alone. Indeed, in *Whitney Corporation v. Helvering*, 105 F. (2d) 438, 441 (C. C. A. 8th), the court specifically stated that it understood that branch of the *Tex-Penn* decision to rest primarily upon the highly speculative character of the securities. No such facts are present here.

Similarly, the *Schuh Trading Co.* case involved newly issued stock of McKesson & Robbins, Inc., a corporation which, during the year, had absorbed the assets and taken over the activities of some sixty wholesale drug companies. The Circuit Court of Appeals in that case referred to the specu-

lative character of the enterprise, the inexperience of the officers and the uncertain future of the company, which when combined with the restriction on sale, deprived the stock of a fair market value that could be ascertained within the meaning of the statute. Pp. 411-412. Again, no such facts are present in the instant case.

We respectfully submit that the court below was correct in concluding that a mere restriction on sale, particularly one of relatively short duration, cannot prevent the securities from having an ascertainable fair market value. Neither the *Tex-Penn* nor the *Schuh Trading Co.* case is to the contrary.

CONCLUSION

There is no basis whatever for review of the first question presented, and the decisions asserted to be in conflict with respect to the second question presented are distinguishable. The petition should be denied.

Respectfully submitted.

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DECEMBER 1940.